89-15

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1989

RAUL MUNOZ - LOPEZ, Petitioner

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 30, 1989

QUESTIONS PRESENTED

1. Does the Fifth Circuit's application of the "waiver doctrine" as regards a co-defendant who properly moves for acquittal at the conclusion of the government's case-in-chief, *and after denial of the motion,* does not present a defense, satisfy this Court's standards of review on appeal?

2. Does the Fifth Circuit's application of the "waiver doctrine" adequately protect the defendant's Fourteenth Amendment due process interests as enunciated by this Court. *In re Winship,* 397 U.S. 358 (1980); *Mullaney v. Wilbur,* 421 U.S. 6894 (1975).

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QUESTIONS PRESENTED

1. Does the Fifth Circuit's application of the "waiver doctrine" as regards a co-defendant who properly moves for acquittal at conclusion of the government's case-in-chief, *and, after denial of the motion, presents no defense,* satisfy this Court's standard of review on appeal?

2. Does the Fifth Circuit's application of the "waiver doctrine" adequately protect the defendant's Fourth Amendment due process interests as enunciated by this Court. *In re Winship, 397 U.S. 358 (1980); Mullaney v. Wilbur,* 421 U.S. 6894 (1975).

OPINIONS BELOW

The opinion and judgement of the United States District Court for the Southern District of Texas in unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is unreported, and is contained in the Transcript of Record. *see* Appendix C.

JURISDICTION

The jurisdiction of this Court to review the judgement of the Fifth Circuit is invoked under U.S.C. § 1254(1).

This petition arises from the July 21, 1988 judgement of conviction entered by the trial court, Honorable Ricardo Hinojosa presiding, pursuant to 21 U.S.C. §§ 841, 846, 952, 963, and 18 U.S.C § 2. The district court's jurisdiction was

invoked pursuant to 18 U.S.C. § 3231. Petitioner timely filed Notice of Appeal on July 21, 1988 pursuant to 28 U.S.C. § 1291.

On appeal, the Fifth Circuit on May 3, 1989, entered an opinion affirming the conviction.

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STATEMENT OF THE CASE

Course of Proceedings Below

There is no international bridge between Mexico and Texas at the Rio Grande River at Los Ebanos, Texas. Anyone wishing to cross to or from Mexico can either pay the ferry or option to wade or swim across. Many take the latter option. In fact, the "illegal" crossing near the Town of Los Ebanos is a well-known trail for undocumented workers as well as drug importers.

Most of the illegal aliens that cross into the U.S. from Mexico at Los Ebanos are men between the ages of 18 and 25. They work in the farms nearby. This is also the average age for persons involved in smuggling marijuana.

On the American side, from the river's edge, a well-defined trail corridors through the brush up the bank and into the residential area of the small Town of Los Ebanos, Texas. From the river, using the trail, one can also get to a rent house where Petitioner was residing at all times relevant to this case. His two co-defendants resided there as well. Petitioner was employed in a nearby town in a paint and body shop.

Petitioner, Raul Munoz-Lopez, and one of his two co-defendants were detained by U.S. Border Patrol officers on the night of February 29, 1988. It was dark. The two were making their way up the Los Ebanos crossing river trail some distance from the river's edge. Suspecting illegal activity and that the two could be guides, the officers handcuffed the two and ordered them to quiet down. Several minutes later, the third co-defendant came up the trail. He too was detained. His clothes were wet and gave a strong odor of marijuana.

About 5 to 7 minutes thereafter, using binoculars to search the area below, the officers could see numerous figures down by the river's edge. They seemed to be carrying shiny objects. These individuals began going up the trail. They whistled. One of the officers, mindful of the possible relationship between the detainees and persons down by the river, asked one of the co-defendants to whistle or respond in some way. One of the officers whistled; the trick apparently did not work. He later rushed those coming up the trail. The figures scattered, crossing back into Mexico and leaving behind some 700 pounds of marijuana.

On interrogation, Petitioner told the officer of being on the American side of the border and of being approached by a man from the Mexican side who was looking for lookouts for the border patrol. Co-defendant Martin Cuevas-Mendoza was interrogated separately and apart from defendant/petitioner, Munoz-Lopez. This co-defendant admitted to involvement by helping to load and cross the

marijuana across from Mexico. He later changed his story during the trial, claiming the three co-defendants were fishing when a man from the Mexican side crossed the river and asked them to serve as "lookouts" for the border patrol.

Agent Gonzales testified that upon being advised of his rights, Petitioner Raul Munoz-Lopez stated, "that he was told to come up the trail and look around and see, make sure nobody was there.". In fact, Munoz-Lopez left immediately and headed in the same direction as the house where he was staying. When he was arrested Raul was not wet, had no odor of marijuana on him, had some change in his pocket and his Texas-issued identification card.

None of the three co-defendants gave written statements to the officers. The only incriminating statements came from co-defendant Cuevas-Mendoza whose own physical appearance and odor doomed him.

Petitioner Munoz-Lopez and the two co-defendants were charged in a four-count indictment with conspiring to knowingly and intentionally import and knowingly and intentionally importing into the United States a quantity exceeding 100 kilograms of marijuana in violation of 21 U.S.C. §§ 963, 952(a), 960 (b) (2), and 18 U.S.C. § 2, and with conspiracy to knowingly and intentionally possess and knowingly and intentionally possessing with the intent to distribute a quantity exceeding 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841 (b)(1)(B) and 18 U.S.C. § 2.

Petitioner's Motion for Acquittal
At the Close of the Government's Case-in-chief

The case was tried to a jury, the Honorable Ricardo Hinojosa, United States District Judge for the Southern district of Texas, presiding. The three defendants moved for judgment of acquittal at the close of the government's case-in-chief. The motions were denied. Defendant Cuevas-Mendoza went forward with the evidence and testified.

Petitioner did not call witnesses. At the conclusion of the evidence none of the defendants moved for acquittal. Testifying in his own behalf, Cuevas-Mendoza bolstered the officers' testimony of his admissions and was generally helpful with the government's case. The jury found the three defendants guilty on all four counts.

On Appeal To The Fifth Circuit

Raul Munoz-Lopez appealed to the Fifth Circuit for a review of the sufficiency of the government's case. The Fifth Circuit, in affirming Raul's conviction, held that (1) by not renewing his motion for acquittal upon presentation of all the evidence, Raul had waived his objection, (2) all the evidence, not just the government's case-in-chief, was proper for review for sufficiency, and (3) the standard of review was not the traditional **Glasser** standard, *Glasser v. United States,* 315 U.S. 60, 80, 62, S. Ct. 457, 86 L. Ed. 680 (1942), but rather a much narrower standard--"whether there was a manifest miscarriage of justice." *United States v. Raul Munoz Lopez,* No. 88-2681, Slip Op. at ____(5th Cir. May 3, 1989) Appendix C. at 4 . This miscarriage of justice exists **only** if the record is devoid of evidence pointing to guilt." *Id.*

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's application of the "waiver doctrine" as regards a criminal co-defendant who properly moves for acquittal at conclusion of the government's case-in-chief, **and, after denial of the motion,** does not present a defense, (a) conflicts with decisions of this Court and other Circuits, (b) diminishes the constitutional burden of production, proof . and persuasion imposed on the government, and 3) violates the criminal defendant's due process rights guaranteed by the Fourteenth Amendment to the United States Constitution.

I.

The Fifth Circuit's application of the waiver doctrine in criminal cases conflicts with the decisions of this Court and other circuits.

Without the least hesitation, the Fifth Circuit has expanded the application of the "waiver doctrine" now applied in all circuits in the review of criminal sufficiency of evidence cases. By holding that one of several co-defendants can unilaterally waive the Court's denial of another co-defendant's motion for judgment of acquittal at the close of the government's case-in-chief, the Court on appeal treats identically the defendant who goes forward with the evidence after denial of his motion for acquittal made at conclusion of the government's case and the defendant who does not call witnesses. This expansion of the "waiver doctrine" directly conflicts with this Court's recognized standard of review. *Glasser,* at 315 U.S. 60 (1940).

The "waiver doctrine" was unknown at common law. It was apparently first recognized in civil cases, *see Runkle v. Burnham,* 153 U.S. 216, 219, 14 S. Ct. 837, 840 (1894) and later incorporated into criminal procedure. *See e.g.,* Note, *The Motion For Acquittal: A Neglected Safeguard,* 70 YALE L.J. 1151 (1961). The federal criminal procedure counterpart, Rule 29(a), has generally been given the same effect by the federal circuits with the exception of the solitary, but persistent *Cephus* rule in the District of Columbia curcuit. *Cephus v. United States,* 324 F.2d 893, 895-97 (D.C. Cir. 1963). In abandoning the *Cephus* rule, the D.C. Circuit clearly enunciated the limits of the waiver doctrine:

> A criminal defendant who, after denial of a motion for judgment of acquittal at the close of the government's case-in-chief, **proceeds with presentation of his own case,** waives his objection to the denial. (emphasis ours).

United States v. Foster, 783 F.2d 1087, 1088 n. 3 (D.C. Cir. 1986) (en banc).

None of the circuits have ever held that the waiver doctrine is applicable in the case in which a co-defendant whose motion for acquittal has been denied does not proceed with calling his own witnesses. *see* U.S. v. Kilcullen, 546 F.2d 435 (1st Cir. 1976); *cert. denied,* 430 U.S. 906, (1977) 97 S.Ct. 1175, 51 L.Ed. 2d 582 (1977); *U.S. v. Gibson,* 675 F.2d 825 (6th Cir. 1982); *U.S. v. Douglas* 668 F.2d 459 (5th Cir. 1982); *cert denied,* 457 U.S. 1108, 73 L.Ed. 2d 1317, 102 S.Ct. 2098 (1982); *Lucas v. U.S.,* 335 F.2d 245, 248 (10th Cir.), *cert. denied,* 384 U.S. 977, 86 S. Ct.1873, 16 L. Ed 2d. 687 (1966).

II.

The Fifth Circuit's application of the waiver doctrine diminishes the burden of proof and persuasion which the due process clause of the Fourteenth Amendment places on the government.

As is the uniform practice in civil cases, **Glasser** has limited the reviewing court in criminal cases to sustain the jury verdict if the evidence, "taking the view most favorable to the Government," supports it. *Glasser* at 469. In doing so, this court has not diminished the government's burden of proving each element of the charge beyond a reasonable doubt.

Within this framework, the waiver doctrine rationally recognizes that the trial judge has the better vantage point from which to consider the sufficiency of the evidence. *See Lucas,* 335 F.2d at 185. Hence, a defendant's failure to move for acquittal removes from the trial judge that consideration and waiver results. To this extent, all the circuits and the Supreme Court are in agreement. But by moving for acquittal at the close of the government's case-in-chief and by not going forward with his own witnesses, Petitioner laid on the government's door step the absolute burden of proving its accusations. The Due Process Clause therefore

required that to convict Petitioner, the government prove each element of every count with which he was charged beyond a reasonable doubt.

Yet, the Court of Appeals' review encompassed all of the evidence, and narrowed its scope of review to determine only "if the record was devoid of evidence pointing to guilt," *United States vs. Ivory*, 468 F.2d 613, 614 (5th Cir. 1972); or "because the evidence on a key element was so tenuous that a conviction would be shocking." *United States v. Bullock*, 551 F.2d 1377, 1385 (5th Cir. 1977).

The court of appeals holding diminishes the constitutional burden of production, proof and persuasion imposed on the government. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed 2d 508 (1975), by departing from the *Glasser* standard of review.

CONCLUSION

For the reasons advanced and for the further reason that the Supreme Court has not decided that the scope of the waiver doctrine applied in criminal cases is coterminous with that in civil cases, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MOTION FOR JUDGMENT OF ACQUITTAL

Motion before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

APPENDIX B

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Motion For Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

APPENDIX C

UNITED STATES VS.
RAUL MUNOZ-LOPEZ
NO. 88-2681, SLIP OP.
(5TH CIR. MAY 3, 1989)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 88-2681
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARTIN CUEVAS-MENDOZA, RAUL MUNOZ-LOPEZ,
and
EMIGDIO CUEVAS-RIVAS,

Defendant-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR-M-88-62-01)

(May 3, 1989)

Before RUBIN, GARWOOD, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellants challenge their convictions on four counts of importation and possession of over 100 kilograms of marijuana. We affirm on sufficiency of evidence grounds.

I.

Appellants, Martin Cuevas-Mendoza, Emigdio Cuevas-Rivas, and Raul Munoz-Lopez, were each convicted on the following counts: (1) conspiracy to import over 100 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 952(a), 960(b)(2) and 963; (2) importation of approximately 721 pounds of marijuana with intent to distribute, in violation of 18 U.S.C. § 2, 21 U.S.C. §§ 952(a) and 960(b)(2); conspiracy to possess over 100 kilograms of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B); and (4) possession of approximately 721 pounds of marijuana with intent to distribute, in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). Each defendant received concurrent sixty-three month sentences on each of the four counts with a four-year supervised release term to follow, plus a $1,500 special assessment for each count.

The convictions stem from an incident that occurred February 29, 1988, on the Texas border. At 7:00 p.m., United States Border Patrol agents Gustavo Gonzalez and Pedro Bustamante began a surveillance of a two-mile stretch of the Rio Grande River near the port of entry at Los Ebanos, Texas. At 9:50 p.m., sensor devices were triggered, indicating activity along the river. The agents walked down a trail to investigate, stopping at a junction about 120 yards from the river. Hiding behind some brush, the agents watched the corridor-like trail that ran through brushy areas near the river. After about five minutes, the agents saw defendants Emigdio Cuevas-Rivas and Raul Munoz-Lopez walking slowly toward them from the direction of the river. The defendants were "looking around" as they walked up the trail. The agents, identifying themselves in Spanish as "Immigration", handcuffed the two defendants and ordered them to sit down. The defendants began to

cough loudly, but stopped on the instructions of the agents. Minutes later, the third defendant, Martin Cuevas-Mendoza, appeared on the trail. The agents identified themselves as "Immigration" and proceeded to handcuff Martin. Agent Gonzalez detected the smell of marijuana on Martin. Martin complained loudly that his handcuffs were too tight. Martin was told to be quiet.

A short time later, the agents witnessed about twenty people proceeding up the trail carrying shiny objects. Someone in the group of twenty whistled three times. After unsuccessfully asking one of the three defendants to "answer", the agents attempted to "whistle back" to the group of twenty. The group members dropped the objects and ran back toward the river. While one of the agents pursued, the other stayed with the defendants because they attempted to flee. Although the pursuing agent was unable to catch any of the fleeing men, the agents found a total of ninety-one shiny bundles along the trail. Random samples taken from eleven of the bundles were later laboratory tested, confirming that the bundles contained marijuana.

The agents questioned the three defendants in a truck near the river, after giving them **Miranda** warnings in Spanish. According to the agents' testimony, Raul and Emigdio stated they had been told to go up the trail and scout for border patrol agents. They told authorities they had just crossed the river together. Martin initially told the agents he had been fishing with a string tied to a can and that he had left the fishing can by the river. He then changed his story and stated that he had been sent to look for Raul and Emigdio when they did not return. Martin told the agents he had been hired to help load the bundles on the Mexican side of the border, help transport the marijuana across the river and unload it, and to act as a scout. A search of the river area failed to reveal any evidence that would indicate the trio had been fishing.

Martin was the only defendant to testify. He testified that while he was on the American side of the river a man

came across from Mexico and asked him to be a guide and "to take care of the road for him." Martin testified that he did not know why the man needed a guide and that although he agreed to act as a guide, he actually intended to return home.

II.

All three of the defendants challenge the sufficiency of the evidence to support their convictions.

We test the sufficiency of evidence to support a conviction by viewing the evidence presented, together with the permissible inferences that may be drawn from it, in the light most favorable to the verdict. Ordinarily, unless we conclude that no reasonable jury could have convicted a defendant on the evidence as viewed in this light, we must affirm the conviction. *Glasser v. United States,* 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Bell,* 678 F.2d 547, 549 (5th Cir. 1982)(en banc), *affirmed,* 462 U.S. 356 (1983). Because the defendants in this case did not renew their motions for acquittal after all the evidence was presented, we must review the claims of insufficiency of evidence here under a much stricter standard. The defendants' failure to re-urge the motions for acquittal waived any objection to the court's denial of their motions at the close of the government's case. *United States v. Ruiz,* 860 F.2d at 615, 617 (5th Cir. 1988); *United States v. Hall,* 845 F.2d 1281, 1284 (5th Cir. 1988). Thus, our review is limited to a determination of "whether there was a manifest miscarriage of justice." *Ruiz,* 860 F.2d at 617. A miscarriage of justice occurs only if the record is "devoid of evidence pointing to guilt." *United States v. Ivory,* 468 F.2d 613, 614 (5th Cir. 1972); or "because the evidence on a key element of the offense was to tenuous that a conviction would be shocking." *United States v. Bullock,* 551 F.2d 1377, 1395 (5th Cir. 1977).

A.

To prove a drug conspiracy, the government must prove beyond a reasonable doubt both the existence of an agreement between two or more persons to violate the narcotics laws, and that each conspirator knew of, intended to join and participated in the conspiracy. *Ruiz,* 860 F.2d at 617-18 (quoting *United States v. Natel,* 812 F.2d 937, 940-41 (5th Cir. 1987)). The evidence amply supports the jury's verdict.

Each of the defendants was apprehended along the river path within minutes after the sensors had been activated in an area frequently used to smuggle both aliens and narcotics. Raul and Emigdio were arrested on the trail walking from the direction where the marijuana was found. They were walking slowly and looking around. When they were stopped by the agents, the two defendants stated they were from Mexico. After being apprehended they coughed loudly in a manner that appeared to be an attempt to alert the other smugglers. Martin was also arrested on the trail. The shorts that he was wearing were damp. Martin smelled of marijuana. Martin also took action that appeared to be a signal to others following him. The three defendants attempted to flee when the agents pursued the smugglers on the trail. All three of the defendants confessed to the agents that they were acting as scouts for the men carrying the marijuana. Martin admitted that he had been hired to load and unload the marijuana as well as act as a scout. Raul and Emigdio admitted being with Martin that night. This evidence is sufficient to support the verdict.

B.

The evidence is also sufficient to uphold the substantive convictions for possession and importation of marijuana. On these two counts, the defendants were charged with aiding and abetting under 18 U.S.C. § 2. The same evidence

which establishes their participation in the conspiracy also supports a finding that they aided and abetted the men who physically carried the marijuana from Mexico into this country. Raul, Emigdio and Martin served as scouts for the smuggling operation; Martin also helped load and unload the marijuana. These activities satisfy the government's burden to establish aiding and abetting. The government must demonstrate that the defendant, "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wish[ed] to bring about, that he "[sought] by his action to make it succeed." *United States v. Soto*, 591 F.2d 1091 (5th Cir. 1979)(citations omitted). Because the jury was entitled to find that the defendants aided and abetted others in the possession and importation of marijuana, the defendants were principals on these counts. *See Soto*, 591 F.2d at 1104 (citing *United States v. Trevino*, 556 F.2d 1265, 1269 (5th Cir. 1977)).

C.

In an additional point, Martin Cuevas-Mendoza contends that resentencing is required because the evidence was insufficient to show that 100 kilograms or more of marijuana was involved in the offenses. He argues that core samples from only eleven of the ninety-one bundles were introduced into evidence; that no evidence was introduced as to the content of the remaining bundles; and that there was no evidence introduced as to the weight of the bundles.

Agent Gonzales testified that all of the bundles were packaged in the same way and that they were emitting an odor of marijuana. Larry Nance, a special agent for the Drug Enforcement Administration, testified that he weighed the marijuana and it weight 721 pounds. Nance also testified that he handled all of the bundles and took the samples from eleven of the bundles at random. He also testified that when handling the bundles in the weighing and sampling process, they emitted an odor of marijuana. This is sufficient evidence to support the jury's implicit finding

that the defendants participated in a scheme to import more than 100 pounds of marijuana into the country. *See Soto*, 591 F.2d at 1102 (viewing evidence under **Glasser** standard). In conclusion, we find the evidence is sufficient to support the convictions under the traditional **Glasser** standard. It follows that the evidence supports the convictions under the lesser manifest injustice standard.

AFFIRMED